

At a Special Term of the Supreme Court of the State of New York held in and for the County of Oswego on January 29, 2021.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
OSWEGO COUNTY

CLAUDIA TENNEY,
Petitioner,
v.

**OSWEGO COUNTY BOARD OF ELECTIONS,
ONEIDA COUNTY BOARD OF ELECTIONS,
CORTLAND COUNTY BOARD OF ELECTIONS,
MADISON COUNTY BOARD OF ELECTIONS,
BROOME COUNTY BOARD OF ELECTIONS,
TIOGA COUNTY BOARD OF ELECTIONS,
HERKIMER COUNTY BOARD OF ELECTIONS,
CHENANGO COUNTY BOARD OF ELECTIONS,
NEW YORK STATE BOARD OF ELECTIONS,
KEITH D. PRICE, JR., and ANTHONY BRINDISI,**

Index No. EFC-2020-1376

Respondents.

DECISION AND ORDER ON BALLOT CHALLENGES

APPEARANCES:

Paul DerOhannesian, Esq., Joseph Burns, Esq., and John Ciampoli, Esq., *for Claudia Tenney*
Bruce Spiva, Esq., Martin Connor, Esq., Alexander Tischenko, Esq. and Alexi Velez, Esq.,
for Anthony Brindisi
Richard Mitchell, Esq., *for Oswego County Board of Elections*
Robert Pronteau, Esq., Vincent Rossi, Esq., and John Dillon, Esq., *for Oneida County
Board of Elections*
Karen Howe, Esq., *for Cortland County Board of Elections*
Tina Marie Wayland-Smith, Esq., *for Madison County Board of Elections*
Robert Behnke, Esq., *for Broome County Board of Elections*
Peter De Wind, Esq., *for Tioga County Board of Elections*
Lorraine Lewandrowski, Esq., *for Herkimer County Board of Elections*
Alan Gordon, Esq., *for Chenango County Board of Elections*
Kimberly Galvin, Esq., and Nicholas Cartagena, Esq., *for New York State Board of Elections*

I.

This is a special proceeding pursuant to Election Law § 16-106 seeking judicial review of the Respondent Boards of Elections' rulings on the validity of absentee and affidavit ballots in the 2020 general election for Member of Congress in New York's 22nd Congressional District. Petitioner Claudia Tenney, the Republican candidate, and her Democratic opponent, Respondent Anthony Brindisi, collectively challenged 1,188 of the Boards' rulings during the canvasses. The Court heard 11 days of testimony from parties and witnesses, as well as argument from counsel, and received 1,474 exhibits, along with 29 evidentiary proffers. The procedural history was complicated, and judicial review delayed, due to canvassing errors (NYSCEF Docs. 110, 111, 153, 172, 173).

With the exception of ballots still being canvassed by the Oneida County Board of Elections pursuant to Court Order, the record is closed. Of the 1,188 challenges initially made by the candidates at the canvasses, 533 were withdrawn during the hearing, and three were not preserved for judicial review. The candidates stipulated to binding resolutions on 43 challenges. Of the candidates' 609 remaining challenges, the Court affirms 470 of those rulings, and overrules the other 139. Accordingly, based upon the stipulations and the Court's rulings, it is **ORDERED** that 54 envelopes containing ballots be canvassed; eight ballots be cast, and those votes counted and added to the tally; 47 ballots be voided, and those votes removed from the tally; and 69 ballot envelopes be remanded and canvassed in accordance with Election Law § 9-209 (which includes 68 ballot envelopes previously returned to the Oneida County Board of Elections). The Court's specific rulings on each of the challenges are set forth in the Appendix consistent with the governing legal principles discussed below.

II.

The Court's role in this proceeding is to preserve the integrity of the electoral system by ensuring that the laws governing elections are strictly and uniformly applied (*Gross v Albany County Bd. of Elections*, 3 NY3d 251, 258 [2004]). This means ensuring that every single valid vote – and only every single valid vote – is counted. Accordingly, all rulings in this Decision and Order are based upon either existing appellate authority or the plain language of the governing statutes and regulations, and each ruling is applied equally to all similarly situated ballots. Previously, this Court exercised its statutory authority and ordered the Boards of Elections to carry out their “dut[ies] imposed by law” by canvassing all ballots in accordance with the provisions of Election Law § 9-209 (Election Law § 16-106[4]). Now, in determining the validity of the properly canvassed ballots, only ballots that were challenged during the canvasses, and only the objections made by the candidates at those canvasses, are considered (*Gross*, 3 NY2d 257; *Benson v Prusinski*, 151 AD3d 1441, 1444 [3d Dept 2017]). In all, the remaining ballot challenges present 17 distinct legal issues, each of which is addressed, and resolved, in Sections “1” through “17” below. The Court's rulings on the individual ballots, in accordance with the legal principles outlined below, are set forth in the Appendix.

1. Ballots Cast by “Purged” Voters.

To cast a ballot in New York State, an individual must be both qualified and registered to vote (Election Law § 5-100; NY Const. Art. II, §§ 5, 6). Voter registrations are actively maintained through the statewide system known as NYSVoter, the “official” registration database for all of New York (Election Law § 5-614[1], [3][h]; 9 NYCRR 6217.1[a], [b]). Through NYSVoter, the eligibility status of every voter is tracked in accordance with regulations promulgated by the State Board of Elections (9 NYCRR 6217.9 and 6217.10).

Qualified individuals who are currently registered, and eligible, to vote on the NYSVoter system are categorized as “active” (they will be listed in the local poll books) or “inactive” (they will not be listed in the local poll books) (9 NYCRR 6217.9[a]). Individuals who were previously registered to vote, but removed by election officials, are identified as “purged” (*Id.*).

Purged status means that an individual “is no longer eligible to vote in an election.” (*Id.*) Once purged, an individual must register all over again in order to be eligible to vote (9 NYCRR 6217.9[a][3]). Individuals may be purged by officials – and removed from the list of eligible, registered voters – for several reasons, including a felony conviction, mental incompetency, moving out of the country, or in the course of federally required voter database maintenance under the National Voter Registration Act (9 NYCRR 6217.9[a][5]).

Regardless of the reason for an individual’s purge, however – and even if a voter was erroneously purged – this Court has no authority to restore her to registered status in a proceeding brought by a candidate under Election Law § 16-106 (*Mondello v Nassau County Bd. of Elections*, 6 AD3d 18 [2d Dept 2004]; *Johnson v Martins*, 30 Misc3d 844, 847 [Sup Ct Nassau Cty 2010]). An individual’s registration status can only be changed by a Court in a special proceeding brought by the individual herself pursuant to Election Law § 16-108. Although this rule may at times be unfair (see e.g. *Common Cause New York v Bd. of Elections in the City of New York*, 16-cv-6122), this Court has no jurisdiction to reregister purged voters in this proceeding (*Gross*, 3 NY2d at 260). Accordingly, the 85 individuals in New York’s 22nd Congressional District who were identified in the NYSVoter database as “purged” are not eligible to vote, and their ballots will not be cast or counted.

2. **Ballots Cast by “Purged Incomplete” Voters.**

To register to vote in New York State, an individual must file a completed voter registration application with the Board of Elections in the county in which she resides (Election Law Article 5, Title II; 52 USC § 20503). So long as her completed registration application is filed at least 25 days before the next upcoming election, the individual applicant will be entitled to vote – even if the local Board fails to properly enter her information into the NYSVoter system database (Election Law §§ 5-210[3]; 9-209[2][a][v]). However, if an individual’s application was not substantially completed at the time it was received by the proper Board of Elections, then that individual is not registered, or entitled, to vote (Election Law § 5-210[8]). An application that is unsigned is not substantially completed, because the State Constitution requires an individual to be identified by her signature when she registers to vote (NY Const. Art. II, § 7). Accordingly, if an individual submits an unsigned voter registration application, she is not registered or entitled to vote.

If such an individual is somehow improperly listed on the NYSVoter database as in “active” status, the Board of Elections is required to review her affidavit ballot and its registration records during the canvass to determine whether or not she was actually entitled to vote (Election Law § 9-209[2][a][v]).¹ This is particularly true when the local Board of Elections has marked a voter as “purged incomplete” in its own records because her registration application was incomplete. Just as this Court cannot permit a Board’s ministerial errors to result in the rejection of valid ballots (*Carney*, 8 AD3d at 1086), so too can it not permit a Board’s ministerial errors to result in the counting of invalid ballots. Accordingly, the eight individuals in New York’s 22nd Congressional District who submitted incomplete voter registration

¹ The canvassing requirements under this provision were outlined in detail in the Court’s January 20, 2021 Order Remanding Ballots to Oneida County (NYSCEFD Docs. 172, 173).

applications and were identified as “purged incomplete” by their county Board of Elections are not eligible to vote, and their ballots may not be cast or counted.

3. Ballots Cast at the “Wrong Polling Site.”

In 2005, the Court of Appeals held in *Panio v Sunderland* (4 NY3d 123) that an affidavit ballot cast by an individual who voted at the wrong polling site cannot be counted (*Id.* at 128). This is often referred to as the “wrong-church, wrong-pew” rule. The *Panio* holding was based, in part, upon the Court’s finding that it “would be unreasonable to require poll workers to ensure that voters are in their proper polling site” (*Id.*). In 2009, however, the Legislature amended Election Law § 8-302(3)(e) to require poll workers to do just that, “and advise the voter of the correct polling place and election district for the residence address provided by the voter to such poll clerk.” Despite this amendment, no Court has subsequently rejected the rule set forth by the Court of Appeals in *Panio*. In addition, the Legislature, despite recent sweeping reforms to the Election Law, continues to codify the “wrong-church, wrong-pew” rule in Election Law § 9-209(2)(a)(iii), which reads:

If the board of elections determines that a person was entitled to vote at such election, the board shall cast and canvass such ballot if such board finds that the voter appeared at the correct polling place, regardless of the fact that the voter may have appeared in the incorrect election district.

Accordingly, even though poll workers are now required to advise voters of their correct polling site on election day, the *Panio* rule still stands. That is because regardless of what the poll worker did, it was still the voter’s error in going to the wrong polling site in the first place that resulted in her casting in invalid ballot, particularly since a voter is given advance written notice of the correct polling site (Election Law § 4-117). The Courts have no authority under Election Law § 16-106 to correct election day errors made by voters (Election Law § 16-106[1];

cf. Carney v Niagara County Bd. of Elections, 8 AD3d 1085, 1086 [4th Dept 2004]).

Accordingly, the 128 ballots in New York's 22nd Congressional District cast by individuals who voted in the wrong polling site are invalid, and may not be cast or counted.

4. Ballots Cast in the “Wrong County.”

An affidavit ballot cast by an individual who voted outside of the county in which she resides (a “wrong county” ballot), just as with an affidavit ballot cast by an individual who voted at the wrong polling site, cannot be counted (*Panio v Sunderland*, 4 NY3d at 128). Although the Legislature amended Election Law § 5-208 in 2019 to permit the transfer of voter registrations across county lines, this amendment did not change the fact that an individual must still cast her ballot at the proper polling place, based upon her election district, in the county in which she resides. While it appears that some of these wrong county ballots may have been cast by students who were improperly instructed by poll workers to report their parents’ home address – as opposed to their collegiate residence – on Section A of the affidavit ballot, this Court has no authority under Election Law § 16-106 to look beyond the face of an affiant’s sworn statement and the Board’s records to determine the residency of a voter (see e.g. *Corrigan v Board of Elections*, 38 AD2d 825, 827 [2d Dept 1972] *affd* 30 NY2d 603 [1972]). Accordingly, the 20 ballots cast by individuals in New York’s 22nd Congressional District in the wrong county will not be counted.

5. "Ministerial Errors" by a Board.

Election Law § 16-106(1) requires the Courts to order the casting and canvassing of all ballots rendered invalid solely because of a ministerial error by a Board of Elections or its employees. Ministerial errors are clerical or other minor errors apparent on the face of the ballot and the Boards' records, such as overlooking a voter's registration records, improperly rejecting timely submissions or failing to properly timestamp ballots (Gross, 3 NY2d 259N3; *Carney*, 8 AD3d at 1086). Four affidavit and absentee ballots were rendered invalid solely because of a ministerial error by a Board of Elections and, accordingly, those ballots must be cast and canvassed.

In addition, 92 absentee ballots were properly cast and canvassed by the Madison County Board of Elections, even though it had failed to properly timestamp the ballot envelopes (*Id.*). The evidence before the Court was uncontested that these ballots were timely delivered to a polling place within Madison County on Election Day (Tr., pp. 369-70, 379-82, 400, 410). Petitioner Tenney's argument that there was no chain of custody for these ballots was not made during the canvass and, therefore, is not before this Court (*Benson*, 151 AD3d at 1444). Even if that argument had been properly preserved, however, it is both legally and factually incorrect (Tr., pp. 185-86, 270; *People v McClellan*, 52 Misc 614, 615 [Sup Ct New York Cty 1907] [acknowledging the presumption that ballots in the hands of public officers are safeguarded "against all interference or disturbance"]).

Moreover, based upon the sworn testimony of Madison County Board of Elections Commissioners Mary Egger and Laura Costello, Deputy Commissioners Kathleen Slade and Margaret Conley, and Clerks Bonnie Matthews and Elizabeth Colvin-Williams, this Court remanded absentee envelopes and ballots marked as Exhibits MA-1 through MA-111, MA-116

through MA-123, and MA-132, for the correction of errors during the canvass (NYSCEF Docs. 153). Thereafter, in the presence of the candidates or their representatives, the Madison County Board of Elections corrected its systematic error of placing a misleading timestamp on the face of envelopes containing absentee ballots that, unquestionably, did not accurately reflect the date that those ballot envelopes were delivered to Madison County polling places. On remand, the Board – based upon the envelopes and ballots themselves, along with other records maintained by the Board – marked on the face of each of those envelopes, in pen, the date that each envelope and enclosed ballot was actually delivered. In fact, 92 of those ballot envelopes were timely submitted to a Madison County polling site on Election Day.

6. Timely Submitted “Registration Applications.”

When the Board of Elections is canvassing an affidavit ballot envelope, and the Boards’ records – along with the sworn statements on the face of the affidavit ballot envelope – establish that the voter was eligible and entitled to vote in the election, it must then cast and canvass her ballot (Election Law § 9-209[2][a][v]). This matter was extensively addressed in this Court’s January 20, 2021 Order, which remanded all affidavit ballots to the Oneida County Board of Elections, so that it could review its records and correct its errors in accordance with the provisions of Election Law § 9-209(2)(a)(v) (NYSCEF Doc. 172, 173). Simply put, Boards of Elections must cast and canvass affidavit ballots submitted by qualified individuals who timely filed completed voter registration applications, even if the Board failed to timely process those applications (Election Law §§ 5-210[3], [8], 5-212[7]). Similar to before, the Court now remands one ballot to the Broome County Board of Elections to review its records and correct their errors in accordance with the provisions of Election Law § 9-209(2)(a)(v).

7. **Ballots Cast by Voters who “Already Voted.”**

An individual may only vote once in an election (*Forman v Haight*, 69 Misc3d 803, [Sup Ct Dutchess Cty 2020] *citing* Election Law § 17-132[3]). Accordingly, an affidavit ballot from an individual who previously signed the poll book upon receiving a machine ballot, with no Board record that the machine ballot had been spoiled, cannot be cast, or counted. The three ballots cast by individuals in New York’s 22nd Congressional District who signed the poll book will not be counted.

8. **“Late Submission” Ballots and Cure Affirmations.**

Absentee ballots must be placed in the mail and postmarked, or personally delivered, to a proper polling site or Board of Elections’ office on or before election day in order to be valid (Election Law § 8-412). Similarly, cure affirmations must be received within seven days of the voter being sent notice of a curable error, or within five days if the notice is given after election day (Election Law § 9-209[3][c]; N.Y. Executive Order 202.58). This Court has no authority to extend the deadlines set forth in the Election Law (*Seawright*, 35 NY3d at 233). Where the timeliness of a ballot or cure affirmation cannot be determined on its face or from other records of the Board, then it is invalid (*Coviello v Knapp*, 91 AD3d 868, 869 [2d Dept 2012]). Accordingly, here, untimely cure affirmations may not be considered in determining the underlying ballot’s validity, resulting in the invalidity of 14 ballots.

9. “BOE Forwarded” Ballots.

Under the plain language of the Election Law, absentee ballots must be placed in the mail and postmarked, or personally delivered, to any polling site or Board of Election’s office within “the county or city of [the voter’s] residence” no later than election day in order to be valid (Election Law §§ 8-410, 8-412). Election Law § 8-410 does not direct who must place the absentee ballot in the mail, or otherwise deliver it, to the proper local Board. As such, a ballot dropped off to a polling site or Board of Elections outside of the county or city of the voter’s residence that is then timely forwarded to the proper local Board of Elections is nonetheless valid, just as with a voter registration application that was initially submitted to an incorrect Board of Elections, and then forwarded to the proper Board.

In order to be timely, however, the envelope forwarding a ballot that a voter delivered to an improper polling site or Board of Elections must still be postmarked no later than election day (Election Law § 8-412[1]; *see also Coviello v Knapp*, 91 AD3d 868, 869 [2d Dept 2012]). Although this may be a harsh result, particularly given the instructions on the absentee ballot envelopes used in this election, this Court has no authority to disregard the strict deadlines for the submissions and receipts of ballots under the Election Law (*Seawright v Bd. of Elections in the City of New York*, 35 NY3d 227, 233 [2020]).² Accordingly, the 51 absentee ballots forwarded by various Boards of Elections in enclosure envelopes that were postmarked after November 3, 2020 will not be counted.

² Despite the clear statutory provision, the instructions printed on the absentee ballots used in this election advised voters that: “[y]our ballot can be returned to any Early Voting or Election Day poll site, or to your local Board of Elections,” potentially misleading voters into erroneously delivering their absentee ballots to polling sites outside of the county of their residence. Looking ahead, and to avoid similar voting problems and confusion, absentee ballot instructions should be corrected to conform to the statute.

10. “Fraudulent Ballots.”

This Court takes every allegation of fraud very seriously. A candidate challenging a ballot on the grounds that it was fraudulently cast bears the burden of establishing, by clear and convincing evidence, that fraud was committed, including disproving any non-fraudulent explanations (*Malone v Rockland County Bd. of Elections*, 110 AD3d 723, 723 [2d Dept 2013]; *Vacco v Spitzer*, 179 Misc2d 584, 586 [Sup Ct Albany Cty 1998]). There is a single allegation of fraud in this proceeding. Tenney challenges two affidavit ballots in Oneida County, ON-449 and ON-450, that appear to have been submitted by the same voter, although that voter used a different last name on each.

Tenney does not, however, submit any additional evidence or testimony establishing that the voter acted fraudulently as opposed to acting by mistake, out of ignorance, or upon the misdirection of a poll worker because of the voter’s name change or spoiled ballot. As such, Tenney has failed to meet her burden of establishing fraud by clear and convincing evidence. Nonetheless, the two ballots were clearly submitted by the same voter, which is impermissible (*Forman*, 69 Misc3d 803; Election Law § 17-132[3]). Because there is nothing on the face of these two ballots indicating which one – if any – was spoiled, neither ballot can be counted. Accordingly, the two ballots cast by the same individual in New York’s 22nd Congressional District, ON-449 and ON-450, will not be cast or counted.

11. The “Signature Review” Standard of Review.

Challenges to signatures on affidavit and absentee ballot envelopes are reviewed by the Courts *de novo* and, because individuals’ signatures often vary over time and for a variety of reasons, will only be sustained if the signatures are “substantially different” from those in the Boards’ records (*Kolb v Casella*, 270 AD2d 964, 964 [4th Dept 2000]). As part of this review, a voter’s use of her initials, abbreviations or titles on the ballot envelopes are expressly permitted by statute, and cannot result in a finding that her signatures do not match (Election Law § 8-506[1][b]; *Stewart v Rockland County Bd. of Elections*, 112 AD3d 866, 866 [2d Dept 2013]). Based upon its review of the challenged signatures, the Court affirms the Boards’ ruling on 62 ballot envelopes; overrules the Boards’ ruling that the signatures were substantially different on eight ballot envelopes and directs those ballots to be cast and canvassed; and overrules the Boards’ rulings that the signatures were not substantially different on three ballot envelopes and directs those ballots to be removed from the vote count.

12. “Extraneous Marks.”

There are a number of well-settled regulations and rules regarding the effect of extraneous marks or writings on a ballot. As is relevant here, unintentional, accidental or inadvertent marks, spills or stains anywhere on a ballot do not render that ballot void, either in whole or in part (*Franke v McNab*, 73 AD2d 679 [1979]). Irregular voting marks, such as bubbles with checks or slashes within them, do not render a ballot void, either in whole or in part (Election Law § 9-112[1]; *Fallon v Dwyer*, 197 NY 336, 338 [1910]). Where there is an erasure mark in a box for a candidate in a particular race on a ballot, the votes in that race will be void, but the votes in all other races on the ballot are valid (Election Law § 9-112[1]; *O’Shaughnessy v*

Monroe County Bd. of Elections, 15 AD2d 183, 189-90 [4th Dept 1961]). Similarly, where the name of a candidate is crossed-out in one race, the votes in that race will be void, but the votes in all other races on the ballot will be valid (Election Law § 9-112[1]; *Application of Flanagan*, 158 Misc 295, 300 (Sup Ct Broome and Chenango Cty]).

Where there are two votes for two different candidates in the same race – an overvote – the votes in that race are void, but the votes in all other races are valid (9 NYCRR 6210.13[a][5]). Where there are two votes for the same candidate on two different party lines in one race – a double-vote – the ballot is not void, in whole or in part; however, only the top vote may be counted (Election Law § 9-112[4]; 9 NYCRR 6210.13[a][7]). Likewise, where there are two votes for the same candidate, one on a party line and one as a write-in, the ballot is not void, in whole or in part; however, only the party line vote may be counted (Election Law § 9-112[3]; 9 NYCRR 6210.13[a][12][i]). Finally, any markings on a ballot other than voting marks or the name of a write-in candidate that were intentionally made in order to distinguish that ballot and make it identifiable after it was canvassed, such as words or initials, render the entire ballot void (*Johnson*, 30 Misc3d at 847-48; *Scanlon v Savago*, 160 AD2d 1162, 1162-1163 [1990]).

Applying these rules to the challenged ballots in this proceeding, the Court finds that eight ballots were improperly rejected by the Boards of Elections, and must be counted, and one ballot was improperly counted by the Boards of Elections, and must be removed.

13. A “Writing in the Envelope.”

Where a voter encloses a piece of paper with a writing on it within her folded absentee or affidavit ballot, that ballot is voided and may not be counted (*Pavlic v Haley*, 40 Misc2d 975 [Sup Ct Schenectady Cty 1963]; Election Law § 9-112[1][a]). However, where a piece of paper or other writing – provided it is not another ballot – is merely included within an affidavit or absentee ballot envelope, and not inside the folded ballot itself, then the ballot is not void and must be cast and canvassed (*Stewart v Chautauqua County Bd. of Elections*, 69 AD3d 1298 [4th Dept 2010]; *see also Alessio v Carey*, 49 AD3d 1147 [4th Dept 2008]). Where multiple ballots are included in the same affidavit or absentee ballot envelope, however, they cannot be cast or canvassed because a voter cannot cast two ballots and it is impossible for the canvassers or the Court to know which ballot the voter intended to validly cast. Accordingly, here, the three absentee and affidavit ballots contained in envelopes alongside other papers with writing on them must be canvassed and cast; however, the one affidavit ballot in an envelope with two other ballots may not be counted.

14. “Improperly Sealed” Ballots.

Petitioner Tenney objected during the Oneida County canvass in late December that several affidavit ballots were improperly sealed at that time – either because a sticker or tape had been used, or because the glue had become unstuck. However, she presented no evidence to the Court that those ballots were not properly sealed when submitted by the voters on election day (Tr. pp. 1074-75). Accordingly, on January 6, 2021, the Court made a summary factual determination pursuant to Election Law § 16-100 that Petitioner Tenney had failed to meet her burden of proving that these ballots were not properly sealed when submitted, rejecting those

challenges (Tr., p. 1077; *see also Ruffo*, 61 AD2d at 848 [affirming special term's finding of fact that ballots were torn or folded by officials, not voters]). Moreover, an individual cannot be found to have not substantially complied with the law during a pandemic because she rightly feared removing her protective facemask in a public polling place and avoided licking an envelope handed to her by a stranger. (Election Law § 9-209[2][a][v]). Accordingly, the two ballots in purportedly unsealed envelopes in the 22nd Congressional District were properly counted.

15. “Substantial Compliance” in Completing an Affidavit Ballot.

In 2019, the Legislature added Election Law § 9-209(2)(a)(v), which directs the Boards of Elections to cast and canvass absentee, affidavit and other paper ballots whenever a voter has “substantially complied” with the provisions of the Election Law. Substantial compliance, as the Legislature directed in a 2020 amendment to Election Law § 9-209(2)(a)(v), excuses voter errors in filling out their affidavit ballot envelope, so long as the Board is able to “determine the voter’s eligibility based on the statement of the affiant or records of the board” (Election Law § 9-209[2][a][vi]). This means that where an affidavit ballot envelope contains a signed oath and sufficient information to identify the voter’s name and current address, the voter has substantially complied with the law and her ballot must be cast and canvassed (Election Law §§ 8-302[3][e][ii], 9-209[2][a][vi]). Accordingly, the Court affirms the Boards’ ruling on five affidavit ballot envelopes, and overrules the Boards’ ruling that seven affidavit ballot envelopes were not substantially compliant and directs those ballots to be cast and canvassed.

16. Use of “Extrinsic Evidence” to Challenge a Ruling

Judicial review of a Board of Elections’ ruling on the validity of an affidavit ballot under Election Law § 16-106(1) is limited to determining whether the Board, based upon the affiant’s oath and the Board’s own records, committed a ministerial error when it decided to cast, or not cast, that ballot (*Delgado v Sunderland*, 97 NY2d 420, 423 [2002]; *citing Corrigan*, 38 AD2d at 827 [3d Dept 1972]). Because of this, the Court may not consider “extrinsic evidence” beyond that which the Board had – or should have had – during the canvass (*Gross v Albany County Bd. of Elections*, 10 AD3d 476, 479 [3d Dept 2004] *affd* 3 NY2d 251; *Carney v Davignon*, 289 AD2d 1096, 1096 [4th Dept 2001]; Election Law § 9-209[2][a][v]).

Although this Court permitted both parties to submit testimonial proffers, including affidavits, in order to preserve their arguments for appellate review, the testimonial proffers of voters were not admitted into evidence (but marked for identification only) and have not been considered by the Court. Accordingly, the eight ballots challenged based solely upon proffered voter testimony and related extrinsic evidence will not be cast or counted. Additionally, other challenges before the Court that relied partially upon extrinsic evidence were resolved without considering any proffered evidence.

17. Challenge to an “Absentee Application.”

Absentee ballot applications cannot be challenged after the absent ballot has been cast (*Messina v Albany County Bd. of Elections*, 66 AD3d 1111, 1114N [3d Dept 2009]). Accordingly, Petitioner Tenney’s challenge to a voter’s absentee ballot application is not before this Court.

III.

Despite the severity of the transgressions that have been uncovered in this proceeding, including multiple violations of state and federal Election Law, this Court has no authority to grant any other relief other than ordering the Boards of Elections to perform “any duty imposed by law” relating to their canvassing of ballots (*Mondello*, 6 AD3d at 21; *Carney v Niagara County Bd. of Elections*, 8 AD3d 1085, 1086 [4th Dept 2004]; Election Law § 16-106[4]), and ruling upon the ballot challenges that are properly before it. The Court cannot order a new election (*Periconi v Power*, 48 Misc2d 39, 392 [Sup Ct Bronx Cty 1965]), nor can it direct a recount (*cf.* Election Law § 9-208[4] [effective January 1, 2021]), and no party has requested any such relief. Accordingly, upon the Petition and Counterpetition in this proceeding, it is hereby

ORDERED that this Court’s Order filed on November 25, 2020 staying the certification of the General Election results for New York State’s 22nd Congressional District (NYSCEF Doc. 64) is hereby vacated; and it is further

ORDERED that the Tioga County Board of Elections shall immediately certify the General Election results for New York State’s 22nd Congressional District in Tioga County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Commissioners of the Oswego County Board of Elections shall:

- (a) appear at the Oswego County Courthouse at 9:30 a.m. on Monday, February 1, 2021 to complete the final canvass in the 22nd Congressional District election;
- (b) cast and canvass the affidavit and absentee ballots marked OS-7, OS-10, OS-12, and OS-14 at that time;
- (c) upon completion of the final canvass, immediately and securely retrieve all Oswego County ballots and election records held by the Court; and

(d) no later than 12:00 p.m. (noon) on Tuesday, February 2, 2021, count and add to the election tally the votes cast on ballots marked OS-1 and OS-6, as well as the results of the final canvass, and immediately thereupon certify the General Election results for New York State's 22nd Congressional District in Oswego County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Commissioners of the Madison County Board of Elections shall:

- (a) appear at the Oswego County Courthouse at 10:00 a.m. on Monday, February 1, 2021 to complete the final canvass in the 22nd Congressional District election;
- (b) cast and canvass the affidavit and absentee ballots marked MA-147, MA-148, MA-164, MA-169 and MA-173 at that time;
- (c) upon completion of the final canvass, immediately and securely retrieve all Madison County ballots and election records held by the Court; and
- (d) no later than 12:00 p.m. (noon) on Tuesday, February 2, 2021, remove from the election tally the votes cast on ballots marked MA-116, MA-117, MA-118, MA-119, MA-120, MA-121, MA-122, MA-123 and MA-132, and count and add to the election tally the results of the final canvass, and immediately thereupon certify the General Election results for New York State's 22nd Congressional District in Madison County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Commissioners of the Cortland County Board of Elections shall:

- (a) appear at the Oswego County Courthouse at 10:30 a.m. on Monday, February 1, 2021 to complete the final canvass in the 22nd Congressional District election;
- (b) cast and canvass the affidavit ballot marked CO-20 at that time;
- (c) upon completion of the final canvass, immediately and securely retrieve all Cortland County ballots and election records held by the Court; and
- (d) no later than 12:00 p.m. (noon) on Tuesday, February 2, 2021, count and add to the election tally the results of the final canvass, and immediately thereupon certify the General Election results for New York State's 22nd Congressional District in Cortland County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Commissioners of the Herkimer County Board of Elections shall:

- (a) appear at the Oswego County Courthouse at 11:00 a.m. on Monday, February 1, 2021 to complete the final canvass in the 22nd Congressional District election;
- (b) cast and canvass the affidavit and absentee ballot marked HE-6 at that time;
- (c) upon completion of the final canvass, immediately and securely retrieve all Herkimer County ballots and election records held by the Court; and
- (d) no later than 12:00 p.m. (noon) on Tuesday, February 2, 2021, count and add to the election tally the votes cast on ballots marked HE-4 and HE-5, as well as the results of the final canvass, and immediately thereupon certify the General Election results for New York State's 22nd Congressional District in Herkimer County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Commissioners of the Chenango County Board of Elections shall:

- (a) appear at the Oswego County Courthouse at 11:30 a.m. on Monday, February 1, 2021 to complete the final canvass in the 22nd Congressional District election;
- (b) cast and canvass the affidavit and absentee ballots marked CH-26, CH-41, CH-47, CH-48, CH-49, CH-50, CH-51, CH-52, CH-53, CH-55, CH-57, CH-58, CH-59, CH-60, CH-61, CH-62, CH-63, CH-65, CH-66, CH-68, CH-69, CH-70, CH-74 and CH-77 at that time;
- (c) upon completion of the final canvass, immediately and securely retrieve all Chenango County ballots and election records held by the Court; and
- (d) no later than 2:00 p.m. on Tuesday, February 2, 2021, count and add to the election tally the votes cast on ballots marked CH-27, CH-29, CH-30 and CH-32, as well as the election tally the results of the final canvass, and immediately thereupon certify the General Election results for New York State's 22nd Congressional District in Chenango County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Commissioners of the Broome County Board of Elections shall:

- (a) appear at the Oswego County Courthouse at 1:00 p.m. on Monday, February 1, 2021 to complete the final canvass in the 22nd Congressional District election;
- (b) cast and canvass the affidavit and absentee ballots marked BR-94a, BR-95a, BR-256a, BR-325a, BR-326a, BR-343a and BR-352a at that time;

- (c) cast and canvass the ballot marked BR-92a pursuant to the provisions of Election Law § 9-209(2)(a)(v) and correct the error, if any, in determining the eligibility of the voter, at that time; and
- (d) upon completion of the final canvass, immediately and securely retrieve all Broome County ballots and election records held by the Court; and
- (e) no later than 5:00 p.m. on Tuesday, February 2, 2021, remove from the election tally the votes on the ballots marked as BR-3a, BR-7a, BR-8a, BR-16a, BR-17a, BR-18a, BR-19a, BR-20a, BR-21a, BR-22a, BR-23a, BR-24a, BR-25a, BR-26a, BR-27a, BR-28a, BR-29a, BR-30a, BR-31a, BR-32a, BR-33a, BR-34a, BR-268a [two ballots], BR-280a, BR-283a, BR-284a, BR-358a and BR-370a, and count and add to the tally the results of the final canvass, and immediately thereupon certify the General Election results for New York State's 22nd Congressional District in Broome County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Commissioners of the Oneida County Board of Elections shall:

- (a) appear at the Oswego County Courthouse at 2:00 p.m. on Monday, February 1, 2021 to complete the final canvass in the 22nd Congressional District election;
- (b) cast and canvass the affidavit and absentee ballots marked ON-51, ON-54, ON-103, ON-110, ON-120, ON-123, ON-228, ON-256, ON-286, ON-301, ON-379 and ON-394 at that time;
- (c) upon completion of the final canvass, immediately and securely retrieve all Oneida County ballots and election records held by the Court;
- (d) no later than 5:00 p.m. on Tuesday, February 2, 2021, remove from the election tally the votes cast on the ballots marked as ON-1, ON-2, ON-14, ON-19, ON-26, ON-30, ON-449, ON-450, ON-477 and ON-478, and count and add to the tally the results of the final canvass; and
- (e) subject to the provisions of the Court's January 20, 2021 Order and completion of that Court-directed canvass, immediately certify the General Election results for New York State's 22nd Congressional District in Oneida County and transfer the official certification to the New York State Board of Elections; and it is further

ORDERED that the Court shall immediately hear argument of counsel concerning any challenges made by candidates to rulings of the Respondent Boards of Elections during the final canvasses to take place on February 1, 2020 at the Oswego County Courthouse, as well as challenges made by candidates to rulings on Oneida County ballots that were canvassed pursuant to this Court's January 20, 2021 Order (NYSCEF Docs. 172, 173); and it is further

ORDERED that the Court's Appendix setting forth the specific rulings on preserved challenges is hereby attached, incorporated, and made a part of this Decision and Order.

Dated: January 29, 2020



HON. SCOTT J. DELCONTE, J.S.C.

ENTER.

PAPERS CONSIDERED

1. Verified Petition of Petitioner Claudia Tenney, sworn to November 4, 2020 (NYSCEF Doc. 1);
2. Verified Answer with Counterclaim and Crossclaim of Respondent Anthony Brindisi, sworn to November 8, 2020 (NYSCEF Doc. 23);
3. Verified Answer of Respondent Oswego County Board of Elections, sworn to November 9, 2020 (NYSCEF Doc. 25);
4. Verified Answer of Respondent Oneida County Board of Elections, sworn to November 9, 2020 (NYSCFE Doc. 26);
5. Verified Answer of Respondent Broome County Board of Elections, sworn to November 9, 2020 (NYSCFE Doc. 33);
6. Verified Answer of Respondent Tioga County Board of Elections, sworn to November 9, 2020 (NYSCEF Doc. 36);
7. Verified Reply to Crossclaims of Respondent Oswego County Board of Elections, sworn to November 9, 2020 (NYSCEF Doc. 38);
8. Verified Answer to the Crossclaims and Counterclaims of Petitioner Claudia Tenney, sworn to November 22, 2020 (NYSCEF Doc. 59);
9. All exhibits admitted to evidence, including those admitted for the limited purpose of preserving a proffer of testimony, during the hearing held on November 23, 2020, November 24, 2020, December 21, 2020, December 22, 2020, December 23, 2020, January 4, 2021, January 5, 2021, January 6, 2021, January 7, 2021, January 8, 2021 and January 11, 2021; and
10. The testimony of all witnesses and the statements ad testimony of parties during the hearing held on November 23, 2020, November 24, 2020, December 21, 2020, December 22, 2020, December 23, 2020, January 4, 2021, January 5, 2021, January 6, 2021, January 7, 2021, January 8, 2021 and January 11, 2021 (Tr. pp. 1 through 1,763).